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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 709

WITTICH MEMORIAL CHURCH, a Corporation,
Formerly Christ Church Pentecostal,
Petitioner,

vs.

GEORGE H. RICHTERBERG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH CIRCUIT

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vs.

GEORGE H. RICHTERBERG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH CIRCUIT

Wittich Memorial Church prays that a Writ of Certiorari be issued to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered in this case on July 15, 1964, affirming the trial court and the judgment by this court overruling the Petition for Rehearing herein on August 27th, 1964.

OPINIONS BELOW

The judgment of the trial court is reported in 222 F. Supp. 324 and the judgment of the Court of Appeals,

Tenth Circuit, of July 15, 1964, is reported in 334 F.2d 869. The judgment denying the petition for rehearing was entered August 27, 1964, Certiorari Record.

The Certiorari Record and nine copies of the printed record are filed with this Petition and made a part thereof.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C.A., Sec. 1254 (1).

T. 28, U.S.C.A., Sec. 1254 (1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

FEDERAL STATUTE INVOLVED

T. 28, U.S.C.A., Sec. 1652:

> The laws of the several states, except where the Constitution or treaties of the United States are Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

Rule 19 of the Supreme Court Rules.

OKLAHOMA STATUTES INVOLVED

T. 41, O.S.A., Sec. 13:

> "The attornment of a tenant to a stranger shall be void, and shall not affect the possession of his

landlord unless it be made with the consent of the landlord, or pursuant to a judgment at law, or the order or decree of a court."

T. 12, O.S.A., Sec. 100:

"If any action be commenced within due time, * * * or if the plaintiff fail in such action otherwise than upon the merits, * * * the plaintiff * * * may commence a new action within one year after the reversal or failure."

T. 15, O.S.A., Sec. 136:

(5) "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

T. 12, O.S.A., Sec. 98:

"If, when a cause of action accrues against a person, he be out of the State or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the State, or abscond, or conceal himself, the time of his absence or concealment shall not be cumputed as any part of the period within which the action must be brought."

T. 12, Sec. 102, O.S.A.:

When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense, except as otherwise provided with reference to a counterclaim or setoff.

T. 12, Sec. 93, O.S.A.:

> Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no other time thereafter:
>
> * * *
>
> (4) An action for the recovery of real property not hereinbefore provided for, within fifteen (15) years.

T. 12, Sec. 977, O.S.A.:

> A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the Justice delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court: * * * and it shall be filed with the papers, without alteration, * * * and a copy of such syllabus shall, in all cases be sent to the court below, by the clerk of the Supreme Court, with the mandate.

QUESTIONS INVOLVED

I

Can a decision of the Court of Appeals, based on foreign law, be sustained in an Oklahoma Diversity Case when the Oklahoma statutory law and state court decisions are to the contrary?

> (a) In a diversity case the status of the District Court is merely that of another Oklahoma Court, which is required to apply Oklahoma statutes and decisions in diversity cases.

(b) The law of a foreign state cannot constitute the basis of a decision in a diversity case when the local state law, either statute or decision, covers the issues.

(c) Rules of Decision (28 U.S.C.A. 1652).

II

Can the decision of the Court of Appeals for the Plaintiff in an Oklahoma diversity case based on foreign law be sustained, when by the application of Oklahoma law the decision would have been for Defendant.

(a) Under Oklahoma law Richterberg was the tenant of the Church at the time he attorned to Rall, consequently he never occupied the land as Rall's tenant and Rall at no time possessed the land adversely to the Church;

(b) Under Oklahoma law the commencement by Rall of his specific performance action in 1950 constituted a recognition by Rall of the title of the Church from the inception of his possession in 1943, and in any event constituted a break in the claimed adverse possession of Rall during the pendency of that action from 1950 until December, 1961, consequently the 15 year period required by Oklahoma statute (T. 12 O.S.A. 1961, 93 (14)) has not expired.

III

The trial court and Circuit Court of Appeals, 10th Circuit, failed to apply the substantive law of the State of Oklahoma in a diversity case arising in Oklahoma; that failure of the trial court and Circuit Court to apply the substantive laws of the State of Oklahoma, is contrary to the rule of law established by this Court in *Erie v. Thompkins*.

IV

1. The lower and appeal court applied the decisions of the courts of Massachusetts (1914) and New York (1925), to Oklahoma Diversity case which held contrary to the law announced in *Honeyman* v. *Andrew,* 253 Pac. 489, by the Oklahoma Supreme Court which passed on the identical question in 1927 and held the law in Oklahoma to be contrary to the law announced by the lower and appellate court.

2. The trial court and Circuit Court of Appeals, 10th Circuit, failed to apply the substantive law of the State of Oklahoma in a case arising in Oklahoma. The failure of the trial court and circuit court to apply the substantive laws of the State of Oklahoma, is contrary to the rule of law established by this court in *Erie* v. *Thompkins,* 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188; also T. 28, U.S.C.A., Sec. 1652.

STATEMENT OF THE CASE

Summary

The ultimate determinative facts are these: This is an action by Richterberg against the Church to quiet title to 160 acre unimproved wheat land in Texas County, Oklahoma, based on adverse possession The Church is the record title owner. Richterberg claims he was in possession adverse to the Church between October, 1961, when he obtained a Quit Claim deed from Harrison E. Rall, and on July 11, 1962, when he brought this action, he endeavors to "tack" on to his claimed adverse possession of his grantor, Rall, which extended from about March 15, 1943, to about October, 1961.

In 1928, Richterberg went into the possession of the land as a wheat crop tenant of the then owners, Mr. and Mrs. Farmhals; when Mr. Farmhals died in September, 1941, Mrs. Farmhals conveyed the land to the Church by deed dated December 30, 1941, recorded January 26, 1942, Ritcherberg was still in possession as such wheat crop tenant. Shortly after the date of that deed, he had notice the Church had become the owner, and he continued thereafter to possess and farm the land as such tenant until about March 15, 1943, when, without any notice to the Church, and without any consent by the Church he attorned to Rall, a stranger to the title and to the Church. Thereafter, Richterberg continued in possession of the land as the tenant of Rall until October, 1961, when he obtained a Quit Claim deed from Rall. Richterberg never notified the Church that he was changing landlords, although he had notice of the change of ownership to the Church shortly after the date of the deed to the Church.

In December, 1942, Rall initiated correspondence with a James H. Martin, a Chicago, Illinois, Real Estate operator, for the purchase of the land after Rall had been told by Richterberg that the land was for sale and to contact Martin. Richterberg and Martin had a meeting in Texas County, Oklahoma, shortly after the Church acquired its deed, at which time, Martin sought to sell the land to Richterberg. The correspondence between Rall and Martin resulted in Rall claiming he had made a contract for the purchase of the land for $1,600.00 from Martin, who Rall contended was the agent of the Church. In 1950, Rall brought an action for specific performance in the State District Court of Texas County, Oklahoma, against the Church wherein he alleged the purported purchase contract, that Martin had, placed him in possession of the land, and prayed for specific performance of

the purported oral contract. That action pended in that District Court of Texas County, Oklahoma, until dismissed in December, 1961, by Rall, at his cost, without prejudice, and without being decided on its merits. Rall remained in possession of the land through his tenant, Richterberg, from about March 15, 1943, until he Quit Claimed to Richterberg in October, 1961. Richterberg then sued the church to quiet the title based on his claim of more than 15 years adverse possession thereof. The case was removed to the Federal Court.

The Church defended on the grounds, among others:

1. That Richterberg was the tenant of the Church at the time he attorned to Rall, a stranger to the title and to the Church, and under Oklahoma law that attornment was void and did not affect the possession of the Church since the Church had not consented thereto; and

2. That neither Rall nor Richterberg ever repudiated the peaceful possession of the farm, and never held adversely.

3. The commencement by Rall of the specific performance action against the Church, the Deed owner of the land, in 1950 constituted a recognition of the Church's title from the inception of his possession in 1943, and in any event constituted a break in the claimed adverse possession of the land by Rall during the pendency of that action from 1950 to 1961.

In affirming the lower court, the Court of Appeals failed to consider applicable Oklahoma decisions and Oklahoma statutes which govern the determinative facts in this case. We respectfully submit this was error and that this Court should consider Oklahoma law to the facts in this case as required by *Erie* v. *Tompkins*.

Rall's possession was not adverse to the Church. In the Circuit Court's opinion, page 874, it is stated:

> "Rall in his action for specific performance against the Church did not recognize any paramount title in the Church."

That statement is contrary to Oklahoma law. In Oklahoma the syllabus is the law of the case and is made so by Statute (T. 12, Sec. 977, O.S.A.).

In *Honeyman* v. *Andrew,* (Okla.) 253 Pac. 489, the Supreme Court of Oklahoma held:

> "The doctrine of adverse possession is to be taken strictly. Such possession is not to be made out by inference but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner."

> "If at any time prior to the expiration of the period of adverse possession, the one in possession recognized the title which he seeks to defeat by his hostile holding, it operates to break the continuity, which is one of the essentials of adverse possession."

The Honeyman case is again cited by the Supreme Court of Oklahoma in *Coats* v. *Riley,* 7 P.2d 644 at 647. The 18th syllabus in the Coats case reads:

> "If the one in possession recognizes the title of one out of possession, at any time prior to the expiration of the period provided by the statute of limitations the continuity of the adverse possession is broken." And at page 652 of the opinion it stated:

> "Under the rule followed by this court every presumption is in favor of possession in subordination to the title of the true owner. Honeyman v. Andrew, 125 Okl. 18, 253 P. 489.

> If the one in possession recognized the title of one out of possession, at any time prior to the expiration of the period provided by the statute of limitations, the continuity of the adverse possession is broken."

By statute, T. 12, O.S.A. 977, the opinions of our court must contain a syllabus prepared by the Court. In Oklahoma the syllabus is the law of the case. *Altus v. Martin*, 268 P.2d 288, and *Whitaker* v. *Texaco Co.*, 283 F.2d 169, 174.

We believe the *Honeyman* and *Coats* cases, *supra*, sustain the contention Rall's specific performance action constituted a recognition of the Church's title, thus Rall's alleged adverse possession from 1950 to 1961 while his specific performance action was pending, was not adverse to the Church.

The Circuit Court in its opinion, page 874, also stated:

> "What he asserted in that action was wholly consistent with his claim of adverse possession. Since his action was never brought to issue or trial and was voluntarily dismissed by him and was not inconsistent with his asserted adverse possession under claim of right, the bringing of the action did not interrupt the running of the statute of limitations. (Citing Endicott v. Haviland, Mass.) 107 N.E. 394; 2 C.J.S., Adverse Poss. Sec. 153, Page 724."

If the Deed title of the Church was not superior to Rall's title why did Rall file a suit in the District Court of Texas County, Oklahoma, in 1950, trying to get that title and in 1961 offered $7500.00 for a deed from the Church?

This may be the law in Massachusetts, but it is not the law in Oklahoma. A Federal Court cannot create or

grant rights denied by the state laws, *Angel* v. *Bullington*, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657, and "the essence of diversity jurisdiction is that a federal court enforces State law and State policy." (same case)

REASONS FOR GRANTING THE WRIT

The Decision of the Tenth Circuit Court of Appeals in this case cannot be left undisturbed and it is imperative that this court correct the errors involved, for several reasons, any one of which qualified for review by this court but which taken together show a compelling need for this court's attention. The Tenth Circuit is in a state of confusion as to its relation as an appellate tribunal to the trial courts subject to its supervision.

Although the Oklahoma statutes were cited in the briefs, the Oklahoma decisions and law was presented to the Tenth Circuit both by brief and oral argument, they failed to apply the substantive law of Oklahoma in this diversity Oklahoma case involving Oklahoma real estate.

1. It failed to apply Oklahoma law to an Oklahoma case and instead applied statutory law of Massachusetts and decision law of New York.

This judgment is clearly against and contrary to the laws of Oklahoma because:

1. It would be unjust and neither law nor reason to permit a Kansas resident who did not have color of title to claim adverse possession of real property located in Oklahoma, that he did not and could not occupy.

2. The supposed agent Martin of Chicago had no written authority or employment to act for the Church in sale of real estate.

a. Such agency must be in writing under our law (Statute of Frauds).

b. He was not a licensed Oklahoma Real Estate Agent.

c. He had no authority to sell or make or accept offer or to endorse $100.00 check.

d. The Church never received any benefits nor condoned his acts.

3. If Rall and Richterberg obtain title to this 160-acre farm which Richterberg bought from Rall for $900.00 (net) then it would be unjust enrichment and the taking of property without just compensation.

4. The law in Oklahoma announced in Honeyman v. Andrew, 253 Pac. 488 (1927), is a case in point and the law in Oklahoma that Rall in filing his suit for specific performance in the District Court of Texas County, Oklahoma, in 1950 on the alleged oral contract is recognizing the superior title of the Church and stops the running of the statute.

5. The Court of Appeals failed to apply the substantive law of Oklahoma to an Oklahoma case as required by title 28 U.S.C.A., Section 1652 and the doctrine announced in Erie v. Thompkins. The effect of which is to decide a Federal question in conflict with applicable decisions of this court, Rule 19 of the Supreme Court rules.

6. The case does not announce the correct law in Oklahoma and is in conflict with the Oklahoma rule of law announced in Honeyman v. Andrews, 253 Pac. 488.

7. The lawsuit filed by Rall against the Church in Texas County District Court in 1950 upon specific performance on his alleged contract of purchase was adjudicated. Although Rall permitted the case to remain on the docket and dismissed it without preju-

dice in 1961, he did not refile it within one year and that action by Rall against the Church was barred by Tit. 12, O.S.A., Sec. 100, O.S.A., and the matter was therefore adjudicated and that 10 year alleged adverse possession could not be tacked on to the Richterberg possession, so this disposes of over 10 years of the alleged 15 year possession.

8. The court failed to apply the Oklahoma law to this diversity case and if it had applied Oklahoma law the judgment would have been for the defendant and not the plaintiff.

9. If the statute means what it says then this judgment is wrong and should be corrected.

ARGUMENT

The trial court and the Court of Appeals did not distinguish between the Law of Ejectment and the Law of Specific Performance. There must be a contract relationship in specific performance. Ejectment is to try possession.

The rule in the *Endicott* and *O'Donnell* cases, *supra*, cited in Circuit Court's opinion at 872-73, is contrary to the rule in *Honeyman* v. *Andrew, supra,* which has been followed by our Court and the law in Oklahoma since 1927. See *Coats* v. *Riley, supra,* and *Johnson* v. *Johnson,* 77 P.2d 745 (Okla.).

The cases of *Marbach .. Holmes,* 52 S.E. 828 (Va.); *Central Pacific Railway Co.* v. *Tarpey,* 168 Pac. 554 (Utah); *Crow* v. *Abraham,* 167 Pac. 590 (Ore.), and other authorities hold, we believe, that the institution of a specific performance action constitutes a recognition of the Vendor's title by reason of the essential requisite that the rela-

tionship of vendor and vendee must exist between the parties to a specific performance action.

In the alternative, if as held by Trial Court and Circuit, page 874 of the opinion, the specific performance action is consistent with this action, and therefore in effect an adverse possession action, then it follows under Oklahoma statutes, 12 O.S.A. 100 and 102, the claim that Rall's possession was adverse stands adjudicated in favor of the Church and against Rall and Richterberg, is barred, and cannot again be litigated in this action. This is true because the statute of limitations had run on the facts and the cause of action alleged in the specific performance action and that action was not refiled within one year after being dismissed without prejudice and without a determination on its merits, as required in Oklahoma by Title 12, O.S.A. 100. In addition thereto, the fact that the parties in the two actions are not the same, this action, as pertains to the claimed adverse possession of Rall, is barred under the above Oklahoma statutes because this action is not substantially the same as the specific performance action. *Hiatt* v. *Auld*, 11 Kan. 176, and for the further reason the identity of the facts essential to maintain the specific performance action are not the same as the facts essential to maintain this adverse possession action. *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 400 (8th Cir.). Also see *Midland Oil Co.* v. *Moore*, 2 F.2d 34, and *Morris* v. *Wise*, 292 P.2d 547.

Adverse Possession

In 3 Am. Jur. 2d 166, Adverse Possession, Sec. 82, it is stated:

> "The situation is entirely different, however, during the running of the limitation period. Then,

although the adverse occupant has certain advantages, particularly as against third persons, yet, if it appears at any time before the statute has run that his possession is subordinate to, or admits of the existence of a superior title, it will not be deemed to be adverse thereto; nor is it material in such case how long the possession is continued for be it ever so long, it is apparent that it must be inferior to that which it admits to be the true title. Indeed to hold otherwise would be to open the door to fraud and artifice."

Vol. 1, Am. Jur., Adverse Possession 164, at page 886, What Constitutes Recognition of Superior Title:

"It is not necessary for the purpose of showing the recognition of an outstanding superior title to prove any express declaration to that effect by the occupant of the property. Such recognition may be just as effectively established by proof of acts and conduct on his part which are, in themselves, a recognition of a superior right in another, or which have a tendency, when considered with other evidence to establish that fact."

In 2 C.J.S., Section 153, page 724, Adverse Possession, it is stated:

"Claimant's suit based on another's title. If claimant in adverse possession of land brings an action involving the title thereto which is based on the existence of a right in another, it will constitute such a recognition of that right as will arrest the running of the statute of limitations in favor of claimant and against such right."

In the case of *Marbach* v. *Holmes*, 52 S.E. 828, the Supreme Court of Virginia held:

"It thus appears that less than three years before the institution of the present action C. W.

Holmes, by the allegations of his bill, admitted that his entry upon and possession of the land was under the alleged contract of purchase from Abraham Holmes, and that the relation of vendor and vendee existed between them.

"In such case the doctrine is well settled in this state that the possession of an incomplete purchaser only becomes adverse when there has been a severance of the relation of vendor and vendee by a distinct avowal on his part that he is holding adversely and not in subordination to the title of the vendor, and notice of such disclaimer is brought home to the vendor."

In the case of *Central Pacific Railway Co.* v. *Tarpey,* (Utah) 168 Pac. 554, the Utah Court held:

"Where before the purchaser under such contract had adverse possession for seven consecutive years he brought suit against the railroad company for specific performance of the agreement, on the theory that T. was its agent, thereby recognizing and admitting its legal title, this broke the continuity of his adverse possession."

In *Crow* v. *Abraham,* 167 Pac. 590 (Ore.), the Court held, quoting a Utah case:

"If a claimant in the adverse possession of land brings an action involving the title thereto which is based on the existence of a right in another, it is such a recognition of that right as will arrest the running of the statute of limitations in favor of the occupant and against such right."

Actions in ejectment, trespass to try title and quiet title are all of a type substantially different in character from an action for specific performance. An action for specific performance is in personam (personal to the party)

while each of the other actions upon which same cases are based are actions in rem.

The allegations in a suit for specific performance of an alleged contract to convey title is contrary to the claim of adverse possession in a suit to quiet title based on adverse possession.

They are not compatible. Suit for specific performance recognizes the title of the owner and the claim of the petitioner to require the owner to convey to him, while in adverse possession, petitioner alleges defendant has not title and the petitioner has title. One disproves the other.

This Court in *St. Louis-San Francisco Ry. Co.* v. *Walker*, (10th Cir. 1962) 305 F.2d. 90, held:

> "Oklahoma has held that adverse possession requires an entry based on claim of right or after entry there must be a distinct denial or repudiation of the right of co-tenant."
>
> "To establish adverse possession the claimant has the burden of proving such a change in the character of the possession as to preclude all doubt as to the nature of the holding or the want of knowledge on that part of the owner. * * * the fact that the Railroad maintained stock pens on its right of way adjoining the stockyard tract created an uncertainty as to intent of the Railroad in regard to the use of the area as stockyards. In all the circumstances the Railroad did not have the clear, positive, and actual adverse possession required to sustain the burden of proof, on its claim of a prescriptive right."

Segelke v. *Alkins*, 357 P.2d 636 (Colo. 1960), where at page 638 that Court held:

> "Where an occupant of land acknowledges or recognizes the title of the owner during the period of

his claimed adverse possession, he fatally interrupts the continuity of his adverse possession and the statute of limitations does not begin to run in his favor until he repudiates the owner's title. See Wier Lumber Co. v. Eaves, Tex. Civ. App. 296 S.W. 481; Minto v. Salem Water and Light & Power Co., 250 P. 722; Honeyman v. Andrew, et ux., 253 P. 489; Eddy v. Clayton (Miss.) 44 So.2d 395; 2 C.J.S., Adverse Possession 149, p. 711."

Rall's Action for Specific Performance Was Adjudicated in Favor of the Church, Because He Did Not Refile It Within One Year After Dismissal.

T. 15, O.S.A., Sec. 100, provides:

> "If any action be commenced within due time, * * * or if the plaintiff fail in such action otherwise than upon the merits, * * * the plaintiff, * * * may commence a new action within one year after the reversal or failure."

The cases hold that unless a new action is commenced within one year which must be on the identical cause of action, same is barred by the Statute of Limitations. *Midland Oil* v. *Moore,* 2 F.2d 34; *Morris* v. *Wise,* 293 P.2d 547. So, under our law, this case by Rall against the Church filed in 1950 and pending until 1961, was adjudicated between the parties because the same cause of action was not refiled within one year.

In *Johnson* v. *Johnson,* (Okla.) 77 P.2d 745, at 746, the Supreme Court of Oklahoma held:

> "In our opinion the continuity of her adverse possession was broken. The general rule is the bringing of an action involving that title to the land will interrupt the running of the statute of limitations."

The same principle applies in this case where the adverse claimant sues for specific performance of a con-

tract involving the sale of the land which he is claiming adversely. When Harrison E. Rall sued the Church for specific performance, he characterized his possession by admitting a superior title in the Church.

In any event, in Oklahoma, there can be no claim of adverse possession between a vendor and a vendee until the contract is performed. Vol. 1, Am. Jur., Sec. 40, Adverse Possession.

In *Immell* v. *Seaverns et al.*, 230 Pac. 69 (Kan.), the Court held:

> "The possession of real property under an executory contract of purchase is in subordination and not adverse to the rights of the vendor or those holding under him."

In *Zeller* v. *Eckert*, 11 L. Ed. 979, 4 How. (U.S.) 129, it is stated:

> "The statute does not begin to run until the possession becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owners."

Friendly possession cannot become adverse because of change of mental attitudes or by caprice. *Comstock* v. *Eastwood*, 18 S.W. 39.

In *Champlin* v. *Tiger*, 356 P.2d 571 (Okla.), our Court held:

> "Mere possession of land without adverse claim of exclusive title or interest is insufficient to establish title by adverse possession. Melton v. Goodman, (Okl.), 317 P.2d 244; Cook v. Craft, (Okl.), 248 P.2d 236."

In *Marbach* v. *Holmes*, (Va.) 52 S.E. 828, the Court held:

> "The possession of a purchaser under an incompleted contract of sale does not become adverse until there is a severance of the relation of vendor and purchaser by a distinct avowal on the purchaser's part that he is holding adversely to the vendor, and notice of such avowal is brought home to the vendor."

The end result is that Rall, by his specific performance action, told the court, under oath, that he, by contract, had recognized the Church had the title to the land; that by such contract he had agreed to purchase that title, but that the contract was not yet completed or performed, and therefore, he petitioned the court to complete the alleged contract for him. Certainly the dismissal of that action without prejudice and the failure to refile the action within one year as required by T. 12, O.S.A. 100, leaves that contract in an uncompleted condition precisely as it was in 1950 when Rall filed the action, with this material distinction—that under the above Oklahoma statutes that action in effect stands adjudicated in favor of the Church and against Rall and Richterberg and was barred from again being litigated in this action. Consequently, regardless of the designation which may be attributed to the specific performance action, the period of time between 1950, when the action was filed, and 1961 when it was dismissed, the statute of limitations cannot run against the Church under present Oklahoma law so as to sustain Richterberg's claim that Rall was in adverse possession of the land.

Richterberg Was a Tenant of the Church at the Time He Attorned to Rall.

The Circuit Court in its opinion has failed to give consideration to the Oklahoma law and determinative facts establishing Richterberg was the tenant of the Church when he unlawfully attorned to Rall.

The Church has fully established Richterberg's possession of the land as the tenant of the Church at the time (about March 15, 1943) when he attorned to Rall, without any notice to the Church that he was changing landlords, and without the consent of the Church. Richterberg had notice of the change in ownership of the land from Mrs. Farmhals to the Church shortly after the conveyance to the Church on December 30, 1941, was recorded and notwithstanding such notice, he continued in possession and farmed the land until he unlawfully and without any notice to the Church attorned to Rall.

In Oklahoma the law is that the tenant of a grantor by implication becomes the tenant of the grantee; therefore, under Oklahoma law, Richterberg became the tenant of the Church upon the change in ownership from Mrs. Farmhals to the Church. See *Montgomery* v. *Hill*, 195 Pac. 897, 898 (Okla.); *Sevy* v. *Stewart*, 122 Pac. 544 (Okla.).

The duty of a tenant to his landlord is to hold possession against third persons, but not the acknowledging the title of third persons. *Kimble* v. *Wilkey*, 204 F.2d 238, 242 (8th Cir.).

Additionally, in Oklahoma the law is that a tenant in possession cannot surrender possession or be released from the terms of his obligation unless he, the tenant, and the landlord agree to such surrender. *Higgins* v. *Street*,

92 Pac. 153 (Okla.). Also see in *Motch's Admin.* v. *Portner,* 34 S.W.2d 744 (Ky.); *Ralph* v. *Deiley,* 141 Atl. 640 (Pa.). Also the burden of proving such surrender was upon Richterberg and he has failed in making that proof. *Peckham* v. *Brayton,* 163 Atl. 179 (R.I.) In fact, the record is void of any effort by him to prove the requisites of an effective surrender under Oklahoma law. In Oklahoma a tenant must surrender possession to his landlord before he can be heard to assert an adverse claim against his landlord. *Hager* v. *Wikoff,* 39 Pac. 281 (Okla.).

The Oklahoma attornment to Rall was void and did not affect the possession of the land by the Church because under the record Richterberg, by his own testimony, admits that he did not obtain the consent of the Church to such attornment, nor at any time thereafter did he obtain the consent of the Church thereto, for he also testified he at no time had any communication whatever with the Church. *Douglass* v. *Mounce,* 303 P.2d 430 (Okla.); *Clark* v. *Keith,* 207 Pac. 87 (Okla.); *Stone* v. *Merrell,* 152 P.2d 952 (Okla.); *Fernow* v. *Phile,* 178 P.2d 106 (Okla.); *Frazier* v. *Banks,* 170 S.W.2d 900 (Ky.).

In its consideration of this petition we respectfully refer the Court to the Oklahoma rule applicable to adverse possession actions to the effect that all presumptions are to be construed against adverse claimants and in favor of the land owner, and that adverse possession must be established by clear and positive proof. *Coats* v. *Riley, supra.*

The judgment in this case as reported by the opinion of this Court issued on July 15, 1964, if permitted to stand, violates the due process clause of the Federal Constitution, the Fourteenth Amendment, and the Oklahoma Constitution, Article 2, Section 7.

Duty of Court to Apply Oklahoma Law.

In the case of *Whittaker* v. *Texaco, Inc.*, 10th Cir. 283 F.2d 169 at 174, where this court held:

> "In Hawks v. Hamill, 288 U.S. 52, 56 et seq., 53 S. Ct. 240, 77 L. Ed. 610, a case arising in Oklahoma, the United States Supreme Court held that a statement of law announced by the Oklahoma Supreme Court should be followed even though it was dictum. We followed Hawks v. Hamill in applying state court dictum in Home Royalty Ass'n v. Stone (10th Cir.) 199 F.2d 650, 654 and Jess Edwards, Inc., v. Goergen, (10th Cir.) 256 F.2d 542, 544. In so doing we were in accord with the rule that has been announced in Oklahoma. In that state the court prepares a syllabus which is filed with an opinion. In City of Altus v. Martin, Okl. 268 P.2d 228, 234 the Oklahoma Supreme Court followed a statement contained in a court prepared syllabus even though it was dictum, the court saying it was adopted by this court, has not been overruled, and is a part of the law of this State."

C.A. Mo. 1960. In diversity cases it is duty of Court of Appeals to apply state law as determined by state reviewing courts, and Court of Appeals has no right to determine what the state law should be. *Hawkeye-Security Ins. Co.* v. *Davis*, 277 F.2d 765.

C.A. N.C. 1962. In diversity case involving matter of local law, Court of Appeals is required to accept interpretation given by Supreme Court of state to its own decisions. Code Ga. 6-1611. *Dudley* v. *Inland Mut. Ins. Co.*, 299 F.2d 637.

C.A. Ohio 1962. Federal Court in diversity action should not attempt to make new state law in conflict with existing decision of state. *Goranson* v. *Kloeb*, 308 F.2d 655.

C.A. Pa. 1960. In malpractice suit brought in federal court on basis of diversity of citizenship, court applies state law and takes its law from authoritative decisions of forum including conflict of law rules. *Dill* v. *Scuka*, 279 F.2d 145.

C.A. Tex. 1961. In a diversity case, where the federal court was dealing with Texas law, it must take its lead from the authoritative decisions of the Texas Courts. *General Acc., Fire & Life Assur. Corp.* v. *Hardin*, 290 F.2d 862.

D.C. Md. 1962. Federal court could not disregard actual disposition of ruling state court case and emphasize some of its general language to a degree where that language would become inconsistent with outcome of case. *Goosman* v. *A. Duie Pyle, Inc.*, 206 F. Supp. 120.

C.A. Ala. 1962. It is the duty of federal court in cases where federal jurisdiction is based on diversity of citizenship to apply the state law declared by the highest state court. *Connor* v. *New York Times Co.*, 210 F.2d 133.

C.A. Iowa 1961. United States Court of Appeals is bound to follow direct decisions of State Supreme Court, where state law controls. *Aetna Ins. Co.* v. *Barnett Bros., Inc.*, 289 F.2d 30.

The Rules of Decision Statute requires the Federal courts to apply state law in diversity cases.

Here the Court of Appeals, not only violated T. 28, U.S.C.A. 1652, but its own decisions and rule announced in *Whittaker* v. *Texaco*, (10th) 283 F.2d 169 at 174, and then applied statute and case law of a foreign state and failed to apply Oklahoma law, which would have changed the outcome of the case.

In this diversity case we have the District Courts and the Court of Appeals, applying case law of the States of New York[1] and Massachusetts[2] to an Oklahoma case, which announced decision is contrary to the Oklahoma law, as announced by the Oklahoma Supreme Court[3] and in violation of T. 28, U.S.C.A., Sec. 1652, which creates a ground for granting certiorari under Rule 19 of the Rules of this Court.

CONCLUSION

The trial court and the Court of Appeals, Tenth Circuit, failed to apply Oklahoma law to a diversity case: Failed to follow the Federal Statute T. 28, Sec. 1652, U.S.C.A., Rules of Decision, and applied Massachusetts and New York case law to an Oklahoma Diversity case, even though the Oklahoma Supreme Court had in *Honeyman* v. *Andrew,* 253 Pac. 489 (1927), held that any recognition of another's title, tolls the running of the adverse possession statute. Had the Federal Court and the Court of Appeals applied Oklahoma law on the case, judgment would have been for defendant.

In Oklahoma every presumption known to the law is against taking deeded land by adverse possession. We think this was a violation of the Federal and State constitutions in taking the land of the Church without due process of law.

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1. *Re O'Donnell,* 240 N.Y. 99, 147 N.E. 541, 543 (1925).

2. *Endicott* v. *Haviland,* Massachusetts, 107 N.E. 394 (based on Massachusetts Statute), Pub. St. C 173, Sec. 32, 196, Sec. 1, R.C.L. 179 (1914).

3. *Honeyman* v. *Andrew,* Oklahoma, 253 Pac. 489 (1927).

WHEREFORE, Petitioner prays that Certiorari be granted and the judgment of the Court of Appeals, Tenth Circuit, be reversed and judgment entered for the defendant, Church.

Very respectfully submitted,

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November, 1964

CHRIST CHURCH PENTECOSTAL, now Wittich Memorial Church, a Corporation, Appellant,

v.

George H. RICHTERBERG, Appellee.

No. 7460.

United States Court of Appeals
Tenth Circuit.

July 15, 1964.

Rehearing Denied Aug. 27, 1964.

Action to quiet title to land which plaintiff claimed by adverse possession. The United States District Court for the Western District of Oklahoma, 222 F. Supp. 324, Frederick A. Daugherty, J., rendered judgment for plaintiff, and defendant appealed. The Court of Appeals,, Orie L. Phillips, Circuit Judge, held that the evidence compelled conclusion that plaintiff who went into possession of land originally under oral lease as tenant on share rental basis from owing joint tenants the survivor of which subsequently conveyed land to a church, who subsequently entered into lease with one claiming rights under contract to purchase executed by church's alleged agent, and who never entered into any relationship with church acquired title to land through adverse possession under claim of right for Oklahoma statutory 15 year period.

Affirmed.

ORIE L. PHILLIPS, Circuit Judge.

Richterberg brought this action against Christ Church Pentecostal to quiet the title to a 160-acre tract of land

situated in Texas County, Oklahoma.[1] Richterberg's claim was based upon adverse possession for the statutory period of 15 years.[2]

The facts, as established by the evidence and substantially found by the trial court, are these:

On November 8, 1930, the land was conveyed to Theodore and Beatrice Formhals, as joint tenants. Theodore died September 25, 1941, and the title to the land passed to Beatrice, as surviving joint tenant. On December 30, 1941, Beatrice conveyed the land by quit claim deed to the church. The church is located in Chicago, Illinois, and at the time of such conveyance Beatrice lived in Chicago and was a member of the church. The deed to the church was recorded in the public records of Texas County, Oklahoma, January 26, 1942.

In the latter part of 1942 and the early part of 1943, James H. Martin—a realtor, whose office was located near the church building in Chicago, and who had drafted, acknowledged, and recorded the deed from Beatrice, at the request of the church—and Rall carried on negotiations for the purchase of the land by Rall. About March 5, 1943, such negotiations culminated in a written agreement by which Martin, purporting to act as the agent of the church, agreed to sell and convey the land to Rall for $1600, and Rall agreed to purchase it and make a down payment of $100 and deposit $1500 in escrow with the First State Bank of Elkhart, Kansas, pending approval of title and delivery of the deed. Rall fully performed his part of the contract. Martin was acting as agent for the church with respect to the land, in some respects, but the extent of his authority

1. Hereinafter referred to as "the land."

2. 12 Okl.St.Ann. § 93; 60 Okl.St. Ann. § 333.

was not established, and the evidence of the church was to the effect that he was not authorized to negotiate for or agree to a sale of the land. The church did not deliver its deed to the land and on July 15, 1944, advised Martin it did not desire to sell the land at that time, apparently because Beatrice, believing the land had potential oil and gas value, had objected to a sale. On August 8, 1945, the church notified Martin it had definitely decided not to sell the land and asked Martin so to notify Rall and return the down payment.

The land is situated near the Oklahoma-Kansas boundary line. Richterberg, a farmer, resided on a farm one-half mile south of the land here involved. Rall resided at Elkhart, Kansas, where he engaged in the business of grain buyer and elevator manager. The land is located about four miles southeast of Elkhart. In 1928, the Formhals entered into an oral lease of the land to Richterberg as tenant on a crop share rental basis, one-fourth to them and three-fourths to Richterberg. The evidence does not show expressly the term of such lease, but the relation of landlord and tenant on a crop share basis continued between the Formhals and Richterberg until Theodore's death, and thereafter between Beatrice and Richterberg. No written lease was ever entered into between the Formhals, or between Beatrice and Richterberg. Oral leases on a crop share basis of land not occupied as a home are not made for long terms. They customarily are made from year to year, so long as the parties desire the relationship to continue. There apparently was never any express renewal or extension of the original lease, or any new lease entered into between them, after the original lease in 1928. It is fairly inferable that the arrangement was continued by implied agreements made each year from 1928 to 1941.

During the period above referred to, Richterberg cultivated and farmed the land and planted a crop thereon each year, except several years in the early 1930's when extraordinary drouth conditions made the growing of crops impossible. The crops planted were winter wheat and milo. In such period there were several years when no crop was produced, because of drouth, or because the wheat crop was destroyed by hail. When a wheat crop was produced and harvested, Richterberg delivered it to an elevator and sent a check to the Formhals for their share of the rent.

Late in 1942 Richterberg ceased to be a tenant of anyone and ceased to farm or possess the land. Four or five months later and about March 15, 1943, he entered into an oral lease of the land with Rall on a crop share basis, one-fourth to Rall and three-fourths to Richterberg.

Richterberg did not have actual notice or knowledge of the deed of December 30, 1941, to the church until after he entered into the oral lease with Rall in 1943. He never at any time had any dealings, oral or written, or any arrangements, express or implied, with the church with respect to the land. He paid no rent to the church and did not at any time or in any wise recognize the church as his new landlord or agree to pay rent to it. It at no time notified him it had acquired the land or demanded any rent from him. Prior to his oral lease with Rall, he never paid any rent to any person, other than the Formhals.

Rall and Richterberg entered the land in 1943. Thereupon, they began and continued operations to improve the land. They removed mounds of dirt, known as "blow bumps," which had formed thereon, by leveling operations, necessary to render it fit for cultivation; they engaged in spraying to kill bindweed, which had infested the land,

and tends to spread and kills all other vegetation it contacts; and they also planted trees to form a windbreak on the land.

There were no fences or buildings on the land, except temporary electrically charged one strand wire fences, which Richterberg erected when he wanted to pasture his cattle on growing winter wheat. That was true of land generally in that area, except tracts on which farmers had their homes. Permanent fences created a problem, because they caused masses of blowing Russian thistle to form along the fence lines.

The church paid the taxes on the land for 1941 and 1942. It mailed a check for the taxes for the year 1943, but it was returned to the church by the County Treasurer of Texas County. The church made no effort thereafter to pay the taxes on the land. Rall paid the taxes for the year 1943 and each year thereafter, to and including 1961. Richterberg paid the taxes in 1962.

Richterberg entered into possession of the land as Rall's tenant in 1943 and continued in such possession, tilled and cultivated the land, planted it to crops, retained his share of the crops produced and rendered Rall's share to him, from 1943, to and including October 24, 1961. On the latter date, Rall executed and delivered a deed to the land to Richterberg and continuously thereafter until the time of the trial below in 1963, Richterberg was in possession of the land, claiming title thereto in his own right through the deed to him from Rall. During that period he exercised complete dominion over the land, cultivated and tilled it, planted it to crops, pastured it, and harvested the crops produced thereon, all for his own benefit.

The records of the local office of the Department of Agriculture, with respect to wheat allotments and other

like matters relating to the land, list Rall as the owner and Richterberg as the tenant of the land.

In August, 1950, Rall brought an action against the church in the District Court of Texas County, Oklahoma. The church appeared in the action. In his complaint Rall alleged that on February 3, 1943, he entered into a contract to purchase the land from the church, acting through its duly authorized agent, James H. Martin; set forth the terms of such contract; alleged he had fully complied therewith, and had demanded a conveyance of the land by the church; that he went into possession of the land in 1943, annually thereafter paid the taxes on the land, continued in possession and exercised full and complete control over the land without objection on the part of the church; and that the church made no demand upon him for possession of the land, but refused and continued to refuse to execute and deliver to him a deed therefor. Such action was not brought to issue or trial and on December 20, 1961, was voluntarily dismissed by Rall.

The church had both actual and constructive notice of Rall's adverse possession under claim of right.

The trial court found that Rall was in actual open, notorious, exclusive, and hostile possession of the land under claim of right from on or about March 15, 1943, until he conveyed the land to Richterberg, and that Richterberg continuously thereafter, until the time of the trial of the action, was in such possession of the land. The trial court concluded that Richterberg had established his title by the adverse possession of himself and Rall for the statutory period of 15 years and entered judgment for Richterberg. The church has appealed.

[1] An attornment, in the law of landlord and tenant, after a grant of the leased land by the lessor to

another, is an acknowledgment by the tenant of the grantee as his new landlord and, fictionally, of his consent to the grant, and an engagement to pay rent to the grantee and otherwise perform to him the covenants of the lease.[3] Richterberg did not do anything constituting an attornment to the church, under his lease with Beatrice.

In 1941 Beatrice may have extended the oral year to year lease between herself and Richterberg into 1942. But she did not and could not extend the oral year to year lease from 1942 into 1943, because she parted with title to the land in 1941. Richterberg testified that he ceased to be a tenant of anyone and ceased to farm or retain possession of the land for a period of several months from late in 1942 until he entered into the lease with Rall in 1943. The trial court so found. His evidence to that effect was uncontroverted. It is clear that there never was a tenant-landlord relationship between Richterberg and the church.

Moreover, the church pleaded as an affirmative defense that Richterberg unlawfully attorned to Rall by the lease entered into between him and Rall and it failed to establish that affirmative defense by proof that Richterberg was the tenant of either Beatrice or the church at the time of the asserted unlawful attornment.

We conclude that Rall and Richterberg entered into a new and independent oral lease of the land shortly after March 15, 1943, and that Rall's possession of the land thereafter, through Richterberg, was not by virtue of any attornment by Richterberg to the church or to Rall, under any lease theretofore made, but was under a new and independent oral lease and oral renewals and extensions

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3. 51 C.J.S. Landlord and Tenant § 277, p. 933; In re O'Donnell, 240 N.Y. 99, 147 N.E. 541, 543; Willis v. Moore, 59 Tex. 628, 636; Souders v. Vansickle, 8 N.J.L. 313.

thereof, until Rall deeded the land to Richterberg; and after that date, Richterberg was in possession of the land in his own behalf, until the time of the trial in the court below.

[2] Rall, in his action for specific performance against the church, did not recognize any paramount title in the church. What he asserted in that action was wholly consistent with his claim of adverse possession. Since his action was never brought to issue or trial and was voluntarily dismissed by him and was not inconsistent with his asserted adverse possession under claim of right, the bringing of the action did not interrupt the running of the statute of limitations.[4]

[3] The land being situated in Oklahoma, the law of Oklahoma controls, and we shall undertake to state the applicable principles of law, as reflected in the decisions of the Supreme Court of Oklahoma.

[4] A possession to be adverse must be open, visible, continuous and exclusive, with a claim of ownership such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of another, but against all titles and claimants.[5]

[5] Actual possession of land is a mixed question of fact and law and consists "of the exercise of acts of dominion over it, in making the ordinary use of it and taking the ordinary profits it is capable of yielding in its present state."[6]

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4. Endicott v. Haviland, 220 Mass. 48, 107 N.E. 394; 2 C.J.S. Adverse Possession § 153, p. 724.

5. Kimble v. Allen, Okl., 298 P.2d 1042, 1044; Nolte v. Sturgeon, Okl., 376 P.2d 616, 617.

6. Cox v. Sarkeys, Okl., 304 P.2d 979, 983; Cox. v. Kelley, Okl., 295 P.2d 1061, 1067.

[6, 7] Actual residence on the land or personal occupancy is not a necessary element of the possession required to perfect the prescriptive title.[7] Neither is it necessary that the land be enclosed with a fence.[8] It is sufficient if the claimant "is doing such acts thereon that indicate in an open, public and visible manner that he has exclusive control over the land, under a claim of right to such exclusive possession."[9]

The payment of taxes is one of the means by which the claim of ownership may be asserted.[10]

[8] An act of ownership and an adverse claim may be manifested by an oral, as well as a written lease.[11]

[9] Where one adverse occupant of land is succeeded by another adverse occupant and there is privity of possession between them and no break in the continuity of the possession, the last one may tack the possession of his predecessor to his, so as to make a continuous adverse possession for the statutory period.[12]

[10] Acts of such character and so definite and observable that they would reasonably indicate to an owner

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7. Tucker v. McCrory, Okl., 266 P.2d 433; Cox. v. Sarkeys, Okl., 304 P.2d 979, 983; Cox v. Kelley, Okl., 295 P.2d 1061, 1067; Farris v. Smallwood, 204 Okl. 195, 227 P.2d 644, 646.

8. Fessler v. Thompson, 191 Okl. 450, 130 P.2d 513, 514; Stern v. Franklin, Okl., 288 P.2d 412, 415.

9. Fessler v. Thompson, 191 Okl. 450, 130 P.2d 513, 514; Stern v. Franklin, Okl., 288 P.2d 412, 415.

10. Anderson v. Francis, 177 Okl. 47, 57 P.2d 619, 622; Cox v. Sarkeys, Okl., 304 P.2d 979, 983; Cox v. Kelley, Okl., 295 P.2d 1061, 1067.

11. Redwine v. King, Okl., 366 P.2d 921, 927, 928.

12. Harris v. Grayson, 146 Okl. 291, 294 P. 187, 193, 194.

of ordinary prudence, should he visit the premises, that ownership adverse to him is being asserted, or sufficient to put him on inquiry, constitute constructive notice of adverse possession.[13]

[11] We are of the opinion that an application of the above principles of law to the facts in the instant case compels the conclusion that Richterberg acquired title to the land through adverse possession under claim of right for the statutory period of 15 years.

The judgment is affirmed.

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13. 2 C.J.S. Adverse Possession § 45b(2), pp. 561-564.